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FILED

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

No. ————

DAVID D. JACKSON on Behalf of Himself and All Others Similarly Situated, et al., *Petitioners.*

v.

NORTHWEST AIRLINES, INC.

No. ————

FRANK L. MURPHY, and FRANK L. MURPHY as Agent for E. A. HICKENLOOPER and Others, *Petitioners.*

v.

NORTHWEST AIRLINES, INC.

No. ————

FRANK L. MURPHY as Agent for B. M. ALDES and Others, *Petitioners.*

v.

NORTHWEST AIRLINES, INC.

No. ————

FRANK L. MURPHY as Agent for H. J. ADELHELM and Others, *Petitioners.*

v.

NORTHWEST AIRLINES, INC.

No. ————

FRANK L. MURPHY as Agent for HOLLACE H. ABRAHAM and Others, *Petitioners.*

v.

NORTHWEST AIRLINES, INC.

No. ————

FRANK L. MURPHY as Agent for DAVID C. ALLISON and Others, *Petitioners.*

v.

NORTHWEST AIRLINES, INC.

No. ————

FRANK L. MURPHY as Agent for JAMES E. ATCHISON and Others, *Petitioners.*

v.

NORTHWEST AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

David D. Jackson, Frank L. Murphy and some 2,800 other plaintiffs, and Ray R. Brown, intervenor, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the said Court of Appeals, dated November 6, 1950, (R. 750) as amended by its order denying petition for rehearing and vacating said judgment, dated January 23, 1951 (R. 761) and its final judgment, dated January 23, 1951 (R. 762) the effect of which was to affirm the judgment of the lower court on the so-called "commerce" issue (R. 695) and to affirm the judgment of the lower court on the so-called "exemption" issue, (R. 463) and to reverse the judgment of the lower court on the so-called "good faith defence under Sec. 9 of the Portal Act", issue (R. 695).

The point involved here is jurisdictional. The decision below contradicts the elementary principle of law that no official or agency of government can possibly by his or its own act enlarge his or its own jurisdiction.

The Court of Appeals below held, jurisdictionally, in affirmance of the trial court that the employees of respondent were subject to the Fair Labor Standards Act and not to the Railway Labor Act. In the same breath it held reversing the trial court, that a ruling of the chairman of the Railway Labor Panel—an agency whose jurisdiction was limited to employees who were under the Railway Labor Act—has the effect of barring recovery of overtime under the Wage Hour Act by 2,800 employees.

Thus a ruling that the District Court and the Court of

Appeals below hold to have been both erroneous and *beyond the jurisdiction of the official making it* is held to constitute an absolute defense under Section 9 of the Portal Act. This result is achieved by the court below even though the court below adopted and agreed with the trial court's findings that the respondent employer knew the ruling in question when it was made to be in grave doubt as to validity and had obtained absolute indemnity from loss if the ruling then being questioned in action then pending was held to be erroneous.

This decision—the first in the country on the particular matter of congressional intent involved here—violently stretches the intent of Congress far beyond that expressed by Congress in the Congressional Record. The clear intent of Congress as expressed in the debates was to avoid just such a result as is brought about by this decision.

This novel holding and result to which the court below gives retroactive effect applying it to claims accruing prior to the date of the ruling in question, if allowed to stand, will furnish a warped and illogical precedent entirely outside and directly contrary to the contemplation of Congress when it passed the Portal Act.

OPINIONS BELOW

The opinion of the District Court on the Portal issue will be found at P. 663 of the Record.

The opinion of the Court of Appeals will be found at Pp. 736-749 of the Record.

JURISDICTION

The final judgment of the Court of Appeals was entered January 23, 1951 (R. 762). The jurisdiction of this court is invoked under 28 U. S. C., Section 1254.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The United States Statutes and Executive Orders involved are:

Fair Labor Standards Act, Title 29, U.S.C.A., Sections 201 to 219.

Section Nine of the Portal of Portal Act, 29 U.S.C.A. Section 258.

Executive Order 9172, dated May 22, 1942, 7 F. R. 3913.

Executive Order 9299, dated February 4, 1943, 8 F. R. 1669.

JUDGMENTS BELOW

The judgments of the Court of Appeals for the Eighth Circuit involved herein are not reported as yet, and will be found at pages 750 and 762 of the record herein.

QUESTIONS PRESENTED

The decision of the Court of Appeals for the Eighth Circuit presents the following questions:

1. Can a ruling of an official, acting erroneously and beyond his own jurisdiction and beyond the jurisdiction of the

agency of which he is a part, be made the basis of the so-called "good faith" defense under Sec. 9 of the Portal Act?

(a) If so, is that defense available to an employer who knew the legality of the ruling to be in grave doubt when it was made and who knew that the Wage Hour Administrator had ruled directly contrary as to the plant in question?[1].

(b) If so, is that defense available to an employer who upon the receipt of the ruling, knowing it to be of grave doubt as to legality, secured absolute indemnity from government contracting officials against financial loss if the ruling in suits then pending was held invalid by the courts?

2. Can a "good faith" defense under Section 9 of the Portal Act based upon a ruling as described above be made retroactive to bar claims accruing before the ruling was made?

3. Is it a valid exercise of power by the Circuit Court below to base its decision upon the assumption that the Trial Court, had it considered such ruling as a ruling of an agency of the United States, would have found that respondent had established a complete defense under Section 9 of the Portal Act?

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[1] The acting Wage Hour administrator had ruled (Oct. 15, 1942) (5 W. H. Reporter 945) as to this particular plant in answer to a question by the Regional Director.

"I agree with your position that the subject employees engaged in producing and installing aircraft parts on the planes in question are engaged in the production of goods for interstate commerce within the general coverage of the Act and that they are not exempt under Section 13(a) (4).

"It would appear that the production and installation of aircraft parts as a part of the manufacture of airplanes produced and used by others, and not as a part of the maintenance or repair of planes used by the air lines in their transportation activities, constitute operations which are not incidental to the usual transportation activities carried on by air carriers. Such manufacturing operations were not within the contemplation of Congress when it applied Title II of the Railway Labor Act to air carriers and when it exempted carriers subject to that Act from the wage and hour requirements of this Act under Section 13(a) (4)."

SUMMARY STATEMENT OF THE MATTER INVOLVED

These suits were brought to recover overtime pay due under the Fair Labor Standards Act while petitioners were employed in respondent's bomber modification plant at St. Paul, Minnesota, between January 1942 and August 1945. Petitioners worked a 48 hour workweek and received only straight pay for the hours worked up to 48 hours each week. The judgment sought to be reviewed affirms their employment to have been within the coverage of the Fair Labor Standards Act. Hence it is apparent that this is not the type of "fringe" or "travel time" case against which the Portal to Portal Act was enacted.

First Trial

In its original answer respondent claimed that its employees engaged in its bomber modification work were subject to the provisions of the Railway Labor Act and hence exempt from the coverage of the Fair Labor Standards Act by reason of Sec. 13 (a) (4) thereof. (Title 28 U.S.C.A. 213 (A) (4). Counsel agreed at the outset of the case that this was the only general issue involved and it was therefore stipulated, with the permission of the court, that this issue be tried first, leaving individual and specific defenses for later determination. This stipulation and order is found at pages 32 to 36 of the record.

Second Trial

After petitioners prevailed on the trial of this issue (R. 463) respondent raised the commerce question as a general issue and trial of that issue was held, the petitioners again prevailing. (R. 695).

Third Trial

While the second trial was in progress Congress passed the Portal to Portal Act and respondent was permitted to amend or supplement its answer with a defense under that Act, (Title 29 U.S.C.A. Section 258) based upon an alleged ruling of the Railway Labor Panel. A third trial was had on that issue during which it developed that the administrative ruling of a governmental agency, relied on by respondent, was in fact an opinion letter of the Chairman of the Panel. (R. 361-362).

The Trial Court held that the Chairman of the Railway Labor Panel acted beyond his jurisdiction and not as an "agency of the United States" under the Portal Act when he ruled the Wage Hour Act inapplicable to these employees and held that in no event could there be an application of the Section 9 "good faith" defense as to those portions of the claims which accrued before the ruling of May 4, 1943, was made.

The Court of Appeals below reversed this holding and held that the Railway Panel Chairman did act as "an agency of the United States" and held that the claims were barred even as to the portion that accrued before the Chairman's ruling was in existence.

Since the first and second issues were decided by the Trial Court in favor of Petitioners and those holdings were affirmed by the Court of Appeals below, the facts outlined here are those which bear primarily upon the third issue, i.e., the applicability of the "good faith" defense under Section 9 of the Portal Act.

In February 1942 the Respondent at the request of the Government began modifying Army airplanes in St. Paul, Minnesota, making various structural mechanical changes and additions to the planes and equipment. Respondent's employees were paid straight time up to 48 hours in accordance with the provisions of the Railway Labor Act. Under date of October 15, 1942, the acting Wage our Administrator ruled specifically (5 W. H. Reporter 945) that the employees were under the Wage Hour Act. Legal actions were started by employees of Respondent prior to April 1943 to recover time and one-half for hours worked in excess of 40 per week pursuant to the Wage Hour Act.

Sometime prior to April 1, 1943, Respondent decided to operate under the Wage Hour Act and so informed the contracting officer of the Army Air Corps (R. 668). Consent to such operation was given by the Army Air Corps (R. 669). On April 6, 1943, (Deft's Exhibit 37, R. 400) Respondent wrote the Air Corps contracting officer advising him that suits under the Wage Hour Act had been commenced by employees against Respondent. On April 1, 1943, Respondent posted a notice to employees on its bulletin board in which it notified its employees that it would after May 1, 1943, operate on a 40 hour week under the Wage Hour Act (Deft's Exhibit 40, R. 349). Respondent applied to the Regional Director of the National War Labor Board for per-

mission to pay overtime above 40 hours in compliance with the Wage Hour Act (Deft's Exhibit 42, R. 345). On April 30, 1943, the Regional Director ruled that such operation and payment was permissible (R. 355). On May 4, 1943, Respondent wrote two letter to William M. Leisersen, Chairman of the Railway Labor Panel (Deft's Exhibit 43, R. 357; Deft's Exhibit 44, R. 358.) These letters requested a ruling as to whether Respondent was under the Wage Hour Act. Mr. Leisersen wrote Respondent under the *same date of May 4, 1943*, to the effect that the employees were under the Railway Labor Act and not the Wage Hour Act (Deft's Exhibit 45, R. 360). The Respondent sought and received an advance decision of the Comptroller General of the United States (Decision #B-33727) to the effect that any recovery or judgment made in Wage Hour actions could legally be reimbursed by the Government to Respondent together with reasonable and necessary costs and expenses of litigation. On May 10, 1943 (Deft's Exhibit 37, R. 406-7-8) the Air Corps contracting officer referring to the Comptroller Generals above mentioned decision advised Respondent that such judgments under Wage Hour suits and costs could be reimbursed to Respondent if Respondent was held to be under the Wage Hour Act. Thereafter on May 17, 1943, Respondent posted a notice notifying its employees that it would not operate under the Wage Hour Act and thereby rescinded its former notice (Deft's Exhibit 48, R. 363). Thereafter Respondent operated under the 48 hour week until the end of the project.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted because the decision below:

1. erroneously decides an important question of Federal Law which has not been settled by this court.

2. flies in the face of the specifically declared intention of Congress.

3. furnishes an erroneous guide and precedent wrongly affecting other litigations.

4. in its retroactive effect has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

5. holds that a decision of the Chairman of the Railway Labor Panel *ruling erroneously upon his own jurisdiction* and directly in conflict with a specific ruling of the Wage Hour Administrator operates to bar wage claims otherwise valid, thereby creating administrative conflict, misunderstanding and confusion.

6. violates the fundamental principle of law that no official or agency of government can by his or its own act extend his or its own jurisdiction.

7. is based upon an improper assumption as to the manner in which the trial court would have determined a fact issue had the trial court reached such issue, thereby further departing from the accepted and usual course of judicial proceeding.

ARGUMENT

The question of who or what constitutes an "agency of the United States" within the meaning of Section 9 of the Portal Act has never been presented to this Court.

Seldom will there be found as definite and specific evidence in the Congressional Record of Congressional intent as is found on the particular point involved here. The judgments in the first trial had already been obtained in this case when Congress debated the Portal Act. Testimony had been offered concerning these cases before the subcommittee of the House Judiciary Committee which was considering this legislation. This lead to discussion of *these particular cases* on the floor of both the House and Senate. This Congressional history clearly indicates that Congress did not intend Section 9 of the Portal Act to apply to a set of facts such as presented here.

The importance of the authority and jurisdiction of the individual or agency making the ruling to justify "reliance" in "good faith" was discussed in the Senate in connection with the passage of the Act. (Congressional Record, Friday, May 2, 1947, pp. 4578, 4579) by Senators Connally and Donnell. It will be noted that Senator Donnell was the manager of the bill on the Senate floor and was one of the members of the conference committee which worked out a compromise with the house conferees so that his answers to Senator Connally's questions constitute an authoritative statement of the opinions and intentions of the conference committee of both houses of Congress.

> "Mr. Connally: Let me suggest to the Senator that if uncertainty results from the rulings of two Federal

agencies, would not the question of the jurisdiction of the respective agencies be a very important factor in determining good faith?"

"Mr. Donnell: I think it would be. However, I wish to say so that there may be no misunderstanding, that Section 9 of the *Portal-to-Portal Act does not give to one agency the right to rule, as against another agency.* But if an employer has, for instance, obtained the opinion of the Wage and Hour Administrator in regard to a particular matter, and also has obtained in regard to that matter a ruling of the Sergeant at Arms of the Senate, for instance, who, with all due deference to his distinguished duties, is not at all connected with the administration of the act, so far as I know, *I think the fact that, on the one hand, the employer has consulted with an agency which has information on the subject, and, on the other hand, has consulted with a particular official who, may not have had any connection with the act, should be and would be taken into consideration by the court in determining whether the* individual employer acted in good faith.

I think the point the Senator made is exactly correct namely, that the fact that a person may consult with a particular agency which has to do with the administration of a particular Act, and then consults with some official who has nothing or but little to do with the administration of the Act, is a fact which the court should and would take into consideration in its determination of whether or not there was a good-faith reliance, in conformity with the particular regulation.

I thank the Senator for remaining."

"Mr. Connally: I thank the Senator from Missouri. Let me suggest to him that my interrogatory was prompted by the fact that frequently we have constituents who have complaints against the Government, and who say, 'Why, So and So told us when he was down

> there, that he would guarantee that we would get so and so,' when as a matter of fact the person reputed to have made the promise had no authority, no jurisdiction, and nothing to substantiate the so-called promise. *My point was merely that reliance on an agency which by law and jurisdiction over a subject matter is one thing to be determined in weighing a man's good faith.* If he consults another agency that has only an incidental relationship to the problem, that would not have much weight."

The agency which was charged by law to interpret the Wage Hour Act is the Wage Hour Administration. As to the chairman of the Railway Labor Panel it is now affirmed by the court below that he had no actual jurisdiction. The interpretations of the Administrator are entitled to "great weight."

In Skidmore v. Swift & Co., 323 U. S. 134 (1944) the Supreme Court, speaking of the Wage and Hour Administrator, stated:

> "We consider that the rulings, interpretations and opinion of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

This would not apply to an opinion of the Chairman of the Railway Labor Panel whose authority was not created by any law and who acted beyond his authority and jurisdiction and merely as an individual official in making his erroneous ruling.

Following is a further quotation from Senator Donnell, Congressional Record, P. 4579:

"Mr. Donnell: I think the Senator is entirely correct. I call to his attention, in that connection, the following observation in the statement of the Managers on the part of the House, pp. 16 and 17 of Report No. 326. The particular language of the statement of the Managers on the part of the House reads as follows:

> 'It should also be noted that under both sections 9 and 10 the regulations, interpretations, enforcement policies, etc., which may be in good faith relied on *must be those of an "agency" and not of an individual officer or employee of the agency.* Thus if inspector A tells the employer that the agency interpretation is that the employer is not subject to the Act, the employer is not relieved from liability, despite his reliance in good faith on such interpretation, unless it is in fact the interpretation of the agency.'

I thank the Senator for his comment."

The statement above quoted on behalf of the Managers on the part of the House was quoted by the trial court (R. 674) and by the *Interpretative Bulletin issued by the U. S. Department of Labor, Wage and Hour Division, Office of Administrator, November, 1947, published in Federal Register, November 18, 1947, which is a general statement as to the effect of the Portal-toPortal Act of 1947 on the Fair Labor Standards Act of 1938. Title 29, Chapter V, Code of Federal Regulations, Part 790. See Sections 790.2, 790.13, 790.14, 790.15, 790.16, 790.17, 790.19, 790.22* of said Bulletin.

The holding below constitutes a direct contradiction of the statement of the Managers on the part of the House as to their understanding.

It must be borne in mind in connection with the Congressional history that the trial court held that the rulings

of the Railway Labor Panel Chairman were contradictory to rulings of the Wage Hour Administrator. The trial court stated concerning the rulings of the chairman of the Railway Labor Panel; (R. 451):

> "And in any event they are also opposed by opinions of the Wage Hour Administrator and the Regional Director of the National War Labor Board."

Direct discussion of this matter of contradictory rulings was had in the House of Representatives. It was there clearly indicated that it was not the intent to allow an employer to choose according to his own desires between conflicting rulings.

Congressman Keating, Congressional Record, February 27, 1947, Page 1569:

> "Mr. Keating. Does the gentleman feel that this employer, getting this second ruling, and then immediately going to the Government and getting from the Government an indemnification agreement, could be said to have acted in good faith in reliance on that ruling? It seems to me that when a person is acting in good faith in reliance upon something he does not, shortly thereafter, go out and get someone else to indemnify him."

It will be noted that Congressman Keating was a member of the original sub-committee of the House Judiciary Committee which drafted the original House bill.

Congressman Walter, Congressional Record, May 1, 1947 Page 4515:

> "The defense of good faith is intended to apply only where an employer *innocently and to his detriment*, followed the law as it was laid down to him by governmental agencies, without notice that such interpreta-

tions were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him."

It will be noted that Congressman Walter was also a member of the original sub-committee of the Judiciary Committee which held hearings and drafted the Bill, and he was also one of the conferees which worked out the final compromise between the versions passed by the Senate and House and was one of the main backers of the bill.

Congressman MacKinnon, Congressional Record, May 1, 1947, Page 4516:

"Mr. MacKinnon. Mr. Speaker, as a member of the Labor Committee I have been interested in the good faith section of this Portal-to-Portal bill. In several cases which were discussed on the floor of the House it appears that there were conflicting rulings as to employers' obligations. Is an employer in good faith when knowing of the two conflicting rulings he claims to have relied on one of them? The answer must be that having notice of conflict, he cannot be said to have relied in good faith when he picks one of the rulings on which to rely, and particularly, it seems to me, under the language of the Bill, when he relies on the ruling that is most favorable to his, the employer's interest.

"Can an employer avail himself of the good faith defense when knowing of two conflicting rulings, he has secured indemnification against the probability that the courts will hold invalid the ruling in accordance with which he is acting?

"Under these circumstances, reliance in good faith does not exist, and the good faith defense is not intended to be made available in such situation.

"When there are conflicting rules and interpretations

by different Government officials, that is exactly the type of case which must be settled in the Courts, and Congress should not and does not intend under this bill to attempt to interfere with final court decisions on such questions."

Congressman Keating and Devitt, Congressional Record, May 1, 1947, Pages 4516-4517:

"Mr. Keating. Mr. Speaker, although not one of the conferees, I know a good deal about their arduous toil and conscientious endeavor. This House owes them a great debt of gratitude for the prodigious effort and the exceedingly high quality of their performance. It is naturally a sense of gratification to me that they have seen fit to adopt two of the provisions for which I contended when the bill was before us: first, a 2 year statute of limitations rather than one year, as to future suits, and second, the tightening up of the "good faith" provisions so as to insure that *this measure will not weaken the Wage* & Hour Act."

"Mr. Devitt: Will the gentleman yield?"

"Mr. Keating: I am happy to yield to my colleague from Minnesota."

"Mr. Devitt: On this question of good faith, does the gentleman remember the situation regarding which evidence was given before the sub-committee of which he was a member, with reference to the employer in my district who had acted pursuant to two different administrative rulings and the action which is pending by a large number of employees to recover sums which they claim are due under the provisions of the Wage and Hour Act?"

"Mr. Keating: Yes; I remember the case to which the gentleman refers, and my view would be this, with reference to that.

When this bill was up for its original consideration, I made some remarks as to the good faith defense. As a member of the sub-committee which drafted the original bill, I do not believe that such defense is intended to apply where an employer had notice of conflicting rulings (but only where he innocently in good faith followed and relied upon a ruling believing it to be valid.

These cases were discussed when the bill was up for consideration on the floor in February where an employer working for the Government on cost-plus war contracts secured indemnification from the Government against the possibility that a ruling would be declared invalid by the courts. In such cases, under the language of the bill, I am sure there could be no good faith defense because the employer apparently did not rely in good faith upon the ruling but went to the contracting officials and secured a guaranty that he would not lose by following certain rulings.

Where an employer has notice of the invalidity of a ruling or where he has notice of conflicting rulings of different departments of the Government the good faith defense cannot be invoked."

The President in his message in signing the Portal Act clearly indicated his understanding that the Portal Act would not bar existing claims under the Wage Hour Act unless there was conclusive evidence that there had been reliance upon proper administrative actions. The President said in his statement:

"I am confident that the purpose of the main provisions of the (Portal) Act is to eliminate the immense potential liabilities which have arisen as the result of the 'portal-to-portal' claims. It is not the purpose of the Act to permit violation of our fundamental wage

and hour standards, or to allow a lowering of these standards. This is evident from the findings of the Congress set forth in Section I of the Act as to the need for legislation.

"Some doubts have been expressed to me, however, concerning the effects of this legislation upon our wage and hour standards.

"Section 2 of the Act relates to existing claims. From my consideration of this Section, I understand it to be the intent of the Congress to meet the problem raised by portal-to-portal claims, but not to invalidate all other existing claims. The plain language of Section 2 of the Act preserves minimum wage and overtime compensation claims based upon activities which were compensable in any amount under contract, custom or practice. Various provisions of the Act such as Sections 3, 9, and 12, would be rendered absured or unnecessary under any other interpretation. Moreover, a contrary interpretation would raise difficult and grave questions of constitutionality. * * *

"I wish also to refer to the so-called 'good faith' provisions of Sections 9 and 10 of the Act. It has been said that they make each employer his own judge of whether or not he has been guilty of a violation. It seems to me that this view fails to take into account the safeguards which are contained in these Sections. The employer must meet an objective test of actual conformity with an administrative ruling or policy. If the employer avails himself of the defense under these Sections, he must bear the burden of proof. He must show that there was affirmative action by an administrative agency and that he relied upon and conformed with such action. He must show further that he acted in good faith in relying upon that administrative action.

The President and the Congress in the discussion and statements hereinbefore quoted were attempting to avoid the exact results which were brought about by the decision below. Therefore there is a clear and compelling reason why this court should review the decision below in order to execute the true clearly expressed intent of Congress.

In Burke v. Mesta Machine Co., 79 F. Supp. (W. D. Penn.) 588 the Court said, "If the defendant *honestly believed* that its practice was right, and if its belief was reasonably founded upon the acts and declarations of any administrative agency of the United States, the plaintiffs have no right to recover any amount in this action." (Emphasis supplied).

"The defense of 'good faith' is intended to apply only where an employer innocently and to his detriment followed the advice as it was laid down to him by governmental agencies *without notice that such interpretations were claimed to be erroneous or invalid.* I do not believe the defendant has satisfied the burden of proof required by the Portal-to-Portal Act." (Emphasis supplied).

"The defendant claims that at least it comes within the provisions of Section 11 of the Portal-to-Portal Act which has to do with liquidated damages. Here again the defendant has sought to show that it is exempt from liability of liquidated damages by reason of its 'good faith'. I am satisfied that this 'good faith' has reference to something different than the good faith of an employer in actually believing that an employee was exempt from the provisions of the Act."

The following cases follow the Burke case in pointing out the contrast in meaning of "good faith" as used in these different sections:

Alicia v. Porto Rico Gas & Coke Co., 89 F. Supp. 938

Reid v. Day & Zimmerman, 168 F. 2nd 356
Rogers Cartage Co. v. Reynolds, 166 F. 2nd, 317

It is clear that in this case no one acted innocently and to his detriment "without notice that such interpretations were claimed to be erroneous or invalid."

Everyone knew the question was in doubt. Suits were pending in the courts to invoke the Wage Hour Act. Respondent knew all about the situation. Respondent knew of the Administrator's ruling, that it was under the Wage Hour Act. Respondent could suffer no "detriment" because it was fully indemnified by government agreements and a Comptroller General's ruling.

What the situation amounted to here was not a "reliance in good faith" without notice but a sort of general agreement participated in by the Respondent, the Air Force contracting officers and the Comptroller General that the courts would be allowed to settle the doubtful questions involved and Respondent would be made whole if liability under the Wage Hour Act was established. Congress had no intent to supply a defense under Section 9 of the Portal Act in this type of situation.

As to the retroactive effects of the decision below, the case of Asselta v. 149 Madison Ave. Corporation is strikingly similar to our situation. In its first decision 18 L. Cases 65,772, the District Court of the Southern Division of New York held that approval by the War Labor Board of a wage formula worked out by agreement of employer and employees was a ruling of an agency within the meaning of Section 9, and granted judgment for defendant. Thereafter it was brought to the attention of the court that a portion of the overtime

wage claims had accrued during the period of some six months prior to the ruling. Judge Rifkind promptly amended the prior decision 18 L. Cases 65,792, so as to limit the Section 9 defense to wage claims accruing *after the date of the ruling.* By startling contrast, in our case, the petition for rehearing brought about an order (R. 761) by which the prior decision was amended by the addition of a direction for the entry of judgment in favor of the defendant, thus wiping out, without statement of reason or principle, the wage claims which *had accrued* during the period of fifteen months prior to the date of the ruling upon which the Section 9 defense is based

The trial court said (R. 672)

> "Obviously no reliance upon a ruling of an administrative agency can exist prior to the existence of a ruling, regulation, order, etc."

The Court also says on the same page (R. 672):

> "In fact, defendant apparently claims no rights under Section 9 until May 4, 1943, when the Chairman of the National Railway Labor Panel advised defendant that, in his opinion, defendant's modification project was subject to the Railway Labor Act and that defendant could not pay its employees pursuant to the Fair Labor Standards Act."

The Trial Court then on the same page (R. 672) concludes:

> "Consequently, the exemption provided in Section 9 cannot be applied under any circumstances until at least May 4, 1943."

The Court of Appeals below accepted the Trial Court's findings as above stated.

Nevertheless, the final judgment sought to be reviewed, without discussion of principle or statement of reason, does apply this exemption to wage claims accruing during a period of fifteen months prior to May 4, 1943 and *prior to the existence of the ruling in question.*

The Trial Court Held That the Opinion Letter of the Chairman Was Not a Ruling of an Agency of the United States.

Although it was clear from the executive orders defining the powers of the Railway Labor Panel that, as the trial court held, only an emergency board could rule upon proposed wage changes, the Court of Appeals held that the Chairman of the Railway Labor Panel acting erroneously and, individually constituted "an agency of the United States," under the Portal Act.

It must be constantly borne in mind that the trial court and the Court of Appeals have both held that these employees were never the employees of a carrier under the Railway Labor Act. The trial court held and the Court of Appeals quoted with approval the holding that their work bore such a "tenuous, negligible and remote relationship to the transportation activities" that they were not subject to the Railway Labor Act and always subject to the Fair Labor Standards Act. It is conceded that the Railway Labor Panel and its Chairman had jurisdiction and authority *only over employees who were under the Railway Labor Act.*

The Chairman of the Panel in the very ruling in question said (Defendant's Exhibit 46 R. 361-362):

> "This executive order applies to all carrier and employees who are subject to the Railway Labor Act, and

> the applications for approval were acted upon because your company and your employees are subject to this act. *Had I thought that the modification center was not covered by the Railway Labor Act, I would have so advised you and returned your application for approval.*" (Italics ours)

It is now clear under the holding of both the trial and Appellate Courts that the Chairman was not only in error in this ruling, but was ruling upon wages of workers over whom he had no jurisdiction or authority. Since he had no jurisdiction or authority over these workers, he could not have acted as an "agency of the United States" as to these workers. It is therefore submitted that the Chairman so acting without authority could not and did not act as an "agency of the United States" within the intent of Congress in the enactment of Section 9 of the Portal Act.

The authority of the Chairman of the Panel and the Panel itself derive from Executive Orders 9172 and 9299. Both these Orders were issued under authority of the Wage Stabilization Act, 50 U.S.C.A., Sections 961 to 971. Section 964 thereof provides in part:

> "No action shall be taken under authority of this act (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938***"

It will be noted that the authority of the Chairman is to determine whether a proposed change in wage rates is within the bounds of the general stabilization program as laid down in Executive Order 9250. But the "ruling" complained of in the instant case was not in response to a proposed change in wage rates. The ruling was in response to the employer's request that it be permitted to comply with the provisions of the Fair Labor Standards Act. Com-

pliance was mandatory. No ruling by any Chairman or Agency could excuse non-compliance. Surely an opinion letter by a Chairman of a Panel, dealing with a question clearly outside the authority of his office, does not rise to the dignity of an "administrative ruling" of a "governmental agency." Of this ruling the trial court (R. 450) said:

> "The opinion of the Railway Board's chairman contains several premises and conclusions which raise a serious question as to the completness of the consideration which was given the problem there."

The Railway Labor Panel's existence was based on the Wage Stabilization Act. How then can a purported ruling by the Chairman of such Panel, which is in violation of the very act itself in that it attempts to affect the Fair Labor Standards Act, be imputed to the Panel and in that way made a ruling of an agency under Section 9 of the Portal-to-Portal Act? We respectfully submit that the Chairman's letter was not a ruling of such an agency for it could not possibly have had sanction of Government behind it under the broadest conceivable construction of the acts involved. Even if the ruling had been made by the Panel, it would have been a violation of the authority which created such Panel and would have been outside the jurisdiction of the Panel. The Panel had jurisdiction only over employees who were under Railway Labor Act and it is now clearly held below that these were not such employees.

The question of what is an "agency" within Section 9 of the Portal Act has not been before this Court. The Court of Appeals, Eighth Circuit, had it although not on similar

factual basis. Wolferman v. Gustafson, 169 F. 2nd 759 (C. A. 8).

In this case the Court of Appeals affirmed the trial court in holding that a judicial decision in an injunction case in favor of the employer and against the Administrator together with the Administrator's dismissal of an appeal therefrom did not constitute an "administrative approval" of the employer's payroll practices which were in violation of the Fair Labor Standards Act. It was said that:

> "the language 'administrative regulation, order, ruling, approval, interpretation' in Section 9 seems to us to have reference only to some formalized expression by the Administrator and not to any conduct or action on his part from which an employer may undertake to make deductions."

There, as here, there were General Findings relating to both the Section 9 and 11 defense. The finding was that the employer had relied in good faith upon the court decision and the dismissal of the appeal. But the trial court had not found whether this constituted "reasonable grounds" as used in Section 11 and therefore its decision was reversed and remanded for determination of that fact issue.

In Jenner v. 320 North Thirteenth St. Co., 18 L. Cases 65,784, it was held that a ruling by a Wage and Hour Inspector, backed up by the opinion of the Wage and Hour Regional Attorney, was not an "agency" ruling within Section 9, the Court pointing out that the ruling must be that of the "agency" not that of an individual member thereof.

In Anderson v. Arvey Corporation 84 F. Supp., (ED Mich.) 55, it was held that failure of a Wage and Hour

Inspector to challenge defendant's payroll practices was not a ruling, regulation or "practice" within Section 9 but that reliance thereon in good faith would constitute a defense against liquidated damages under Section 11. To the same effect is Brown v. Dunbar & Sullivan Dredging Co. 17 L. Cases 65,613.

May The Court Of Appeals Assume The Manner In Which The Trial Court Would Have Determined A Fact Issue Had The Trial Court Reached It?

Both Sections 9 and 11 of the Portal to Portal Act include the element of "good faith." Section 9 (set forth in the footnotes of the Record at page 736) provides a complete defense to an action for overtime wages due under the Fair Labor Standards Act if the failure to pay was "in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States * * * ". If "good faith" be established the employee may not recover his wages even though it be conceded or conclusively established by court decision (as here) that wages were earned and remain unpaid. The defense may be likened to the defense of discharge in bankruptcy or outlaw. The debt remains but the debtor doesn't have to pay it. Section 11 authorizes the Court, in its discretion, to reduce or abate the liquidated damages running with recovery if the employer proves to the satisfaction of the court that the omission was "in good faith and that the defendant had reasonable grounds for believing that its failure or omission to pay was not a violation * * * ."

So far as we know, wherever the question has arisen the

courts are in agreement that "good faith" as used in Section 9 carries a connotation higher or other than as used in Section 11.

In the instant case the trial court in considering whether a defense had been made under Section 9 held that the opinion letter of the Chairman of the Panel was not an administrative ruling of a governmental agency. That being so the court did not reach or consider the question of whether there had been good faith reliance as required by Section 9. That the trial court did not reach or consider this question is clearly shown by a reading of its memorandum decision (R. 671 through 679). It will be seen that in discussing the applicability of Section 9, the trial court never even mentioned "good faith" save in stating that it was a necessary element of a defense.

In the following section of its memorandum (R. 680) under the heading "B. Should the Court Exercise the Discretion Granted by Section 11?" the court considers whether defendant's omission was in "good faith" within the scope of Section 11 so that it should be relieved of liquidated damages or some part thereof and the conclusion was that defendant should be relieved of liquidated damages save simple interest from payroll date. The adjudication of the court respecting both the Section 9 and Section 11 defense is embraced in a single set of findings. The Court of Appeals, after holding the Chairman's opinion letter to be an administrative ruling of a governmental agency, quotes certain language from the general findings and *assumes* that the trial court, had it so considered the opinion letter, *would have found* that respondent had established every element of a defense under Section 9. It is apparent that the Trial Court was

of the opinion that its determination that there was no "agency" ruling eliminated the defense under Section 9. Other language in the General Findings indicates that if the Trial Court had felt that the Section 9 defense was not barred by the Trial Court's decision on the "agency" question other elements necessary to a Section 9 defense such as "good faith" and "reliance" might have been found not to exist.

It is clear from the Trial Court's opinion which was made a part of the findings that the Trial Court did not intend to conclusively find "reliance" on the Railway Labor Panel Chairman's Ruling of May 4, 1943 as required under section 9. The Trial Court said (R. 679):

> "Indeed, it would seem that the Air Corps letter of May 10, 1943, indicates that defendant had decided prior to its receipt to follow Chairman Leisersen's ruling if it could obtain assurance from the Government that reimbursement would be made if recovery was obtained under the Wage and Hour Act."

The Trial Court at many points in its opinion indicated the conviction that respondents had actually relied upon the Government's guarantee of reimbursement rather than the ruling in question.

The Trial Court stated (R. 690):

> "Defendant relied upon the Air Corps letter for the right of reimbursement from the Government for Fair Labor Standards Act judgments, and operated the project under the Railway Labor Act thereafter until the project closed."

The Court of Appeals (R. 745) lifts a section of the Gen-

eral Findings to show "reliance on, that opinion in good faith." The Trial Court, of course, was referring to the Section 11 defense. The Court of Appeals, after holding the opinion letter of the Chairman to be an administrative ruling *assumes* that if the trial court had reached the point of considering "good faith" as used in Section 9, it would have found as it did find under Section 11. In other words, because the trial court found "good faith" as a requisite to a defense against liquidated damages, it would have found "good faith" in coincidence with reliance upon an agency ruling so as to establish a defense, not against liquidated damages, but against *earned and unpaid wages.* Putting it still another way, the Court of Appeals seems to say that "good faith", as used in these different sections, carries identical legal significance *as matter of law* and that because good faith was found as an element of a Section 11 defense the court *was bound* to find that defendant's action in conformity with a ruling was in "good faith" reliance thereon as required under Section 9 of the Portal Act. And this notwithstanding the obvious fact that Congress was dealing with two distinctly different situations, one to alleviate against a penalty, and the other to provide a defense against an earned wage.

We go further and assert that upon this record there is no room for findings of "good faith" or "reliance" elements of a Section 9 defense. The interpretation of the Administrator has already been quoted from the Burke Case (supra). Of course it is not binding upon the Courts. Regardless of the weight or consideration which the Courts should give it, it does seem eminently fair to say that good faith reliance on an administrative ruling means, at least, that the employer

must *have then entertained an honest belief* in the validity and integrity of the ruling. That when he did what he did, he thought it right to do so. The respondent here knew that the ruling was probably invalid. Suits were pending for this overtime pay when the ruling was made. Respondent itself had stated that it was under the Wage-Hour Act. The Wage-Hour Administration had so ruled. If these things be so, the respondent is not entitled to the Section 9 defense because the record is perfectly clear that there was no such honest belief. On the contrary, on April 1, 1943, respondent notified its employees (R. 349) that it had been advised that they were entitled to the benefits of the Fair Labor Standards Act and that it was seeking an arrangement which would permit payment accordingly. The May 4, 1943, ruling of the Chairman of the Panel, therefore, was at variance with respondent's information and belief. See also Exhibits 41 and 42 (R. 352 and 354) wherein respondent officially acknowledges, on its best information and belief, its liability to its employees for overtime under the Fair Labor Standards Act. How can respondent claim good faith reliance upon a ruling which it considered erroneous? Respondent acted in conformity with this ruling but its reliance was on the Government's promise of indemnity for error which it promptly obtained from the contracting officer. The letter, dated May 10, 1943, guaranteeing reimbursement for losses sustained by violation of the Fair Labor Standards Act is reproduced in the footnotes of the Record at page 676. If good faith reliance upon a ruling means an honest belief in the validity of the ruling this documentation would seem to foreclose respondent from the asserted defense. But in any event the existence of "good faith" as an element of a Section 9 de-

fense, that is "good faith" in conjunction with reliance upon a ruling, was a fact issue for the determination of the trial court. The trial court did not reach it. We do not believe the Court of Appeals may assume the manner in which the trial court might have decided it and order judgment for defendants upon that assumption.

CONCLUSION

It is therefore petitioner's conclusion that this decision should be reviewed by this court because:

1. The definition of what constitutes an agency of the United States under Section 9 of the Portal Act is of extreme importance and has never been decided by this court.

2. The Court of Appeals by its decision imposes a good faith defense under Section 9 of the Portal Act based upon good faith reliance upon a ruling which wasn't in existence during the period of the first 15 months for which these wage claims are asserted.

3. The interpretation of what constitutes an agency of the United States as contained in the decision appealed from is directly contrary to the Congressional intent as shown in the debate during consideration by Congress of the Portal Act.

4. The Court of Appeals erred and departed from the accepted and usual course of judicial proceeding in assuming what the findings of the trial court would have been had the trial court found the ruling in question to be a ruling of a properly constituted agency of the United States.

5. A gross injustice is being done 2,800 wage earners by the retroactive effect of the decision appealed from and an

erroneous precedent is set up for future and pending litigations.

6. The effect of the decision is to allow a governmental official to enlarge the extent of his own jurisdiction by his own erroneous, unauthorized decision in conflict with a valid and properly authorized ruling of another official.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 36

DAVID D. JACKSON, ET AL., PETITIONERS

v.

NORTHWEST AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The first opinion of the United States District Court for the District of Minnesota (R. 431) is reported at 70 F. Supp. 501. The second opinion (R. 609) is reported at 75 F. Supp. 32, and the third (R. 663) at 76 F. Supp. 121. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 734) is reported at 185 F. 2d 74.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1951 (R. 762). The time for filing the petition for a writ of certiorari was ex-

tended until April 30, 1951, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case the ruling of the Chairman of the National Railway Labor Panel forbidding respondent's adoption of a forty-hour workweek for certain of its employees was a ruling of an "agency of the United States" within the meaning of Section 9 of the Portal-to-Portal Act.

2. Whether respondent's failure to pay petitioners on the basis of a forty-hour workweek was in good faith in reliance on that ruling.

STATUTE AND EXECUTIVE ORDERS INVOLVED

Sections 9 and 10 of the Portal-to-Portal Act (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C. §§ 258, 259) and pertinent portions of Executive Orders No. 9172, May 22, 1942 (7 F. R. 3913, 3 C. F. R. Cum. Supp. 1164) and No. 9299, February 4, 1943 (8 F. R. 1669, 45 U. S. C. § 156, Note), are set forth in the Appendix, *infra,* pp. 23-28.

STATEMENT

1. *Background.* The facts giving rise to this dispute were found by the district court to be as follows: Respondent, Northwest Airlines, Inc., was, until 1942, engaged exclusively in operating a commercial airline (R. 686). Its employees were, consequently, subject to Title II of the Railway Labor Act (45 U.S.C. § 181) and exempted from the Fair

Labor Standards Act by Section 13(a)(4) of the latter statute (29 U.S.C. § 213(a)(4)). They were accordingly paid on the basis of a forty-eight hour workweek. In February, 1942, respondent, at the request of the United States, began to modify bomber planes at the St. Paul, Minnesota, Airport (R. 686). Subsequently, a general contract covering the modification work and other war projects upon which respondent was engaged was executed by respondent and the Government on a cost plus fixed fee basis (R. 686-687). All of the petitioners were employed at the Modification Center at St. Paul (R. 687).

When the modification work was first undertaken it was done by regular airline employees and, for at least a short time thereafter, some employees were employed on both modification work and regular airlines work (R. 688). The project rapidly expanded, however, and, at its close, about 5,500 persons were employed at the Modification Center alone compared to the approximately 900 persons employed on regular airlines work when the project began (R. 688-689). Although the modification project was eventually physically separated from the airlines operation (R. 688-689), the project employees were carried on respondent's regular payroll and were processed for employment and treated generally for administrative purposes in the same manner as regular employees (R. 687).

2. *Administrative rulings.* In August, 1942, Local 134 of the UAW-CIO petitioned the National Labor Relations Board to certify a collective bargaining representative for the employees at the Modification Center (R. 98). After a hearing, the Board, on February 13, 1943, dismissed the petition for want of jurisdiction (R. 99), holding that the modification project was not an enterprise "separate and distinct" from the regular airlines business and refused to pass on the dispute because it did not clearly appear that "the National Mediation Board, the agency primarily vested with jurisdiction by the terms of the Railway Labor Act, has declined to assume jurisdiction over the operations here involved" (R. 104). At about the same time the Wage-Hour Administrator, after first indicating that the project employees were subject to the Fair Labor Standards Act,[1] stated in a letter to the counsel for the Air Transport Association, of which respondent was a member, his "position on the interpretation of the section 13(a)(4) exemption of the Fair Labor Standards Act" (R. 398). After declaring that he believed he should be guided by the decision of the National Labor Relations Board in the representation pro-

[1] The Administrator's earlier opinion is contained in an intra-departmental memorandum, dated October 15, 1942, from the Acting Administrator to the Regional Administrator in response to an inquiry from the latter. It was reported at 5 Wage and Hour Reporter 945. It is not included in the Record but is set forth in part at p. 5 of the Petition.

ceeding involving the employees of Northwest Airlines, he said (R. 399-400):

> It is my position therefore that so long as activities carried on by air lines in pursuance of contracts executed with Government agencies for the duration of the war and in furtherance of the prosecution of the war bear a reasonably close relationship to the primary air transport operations for which the air lines have been created, the Wage and Hour Division in its enforcement of the Fair Labor Standards Act will apply the provisions of the section 13(a) (4) exemption to employees engaged in such activities.
>
> * * * * *
>
> Nothing in this letter should, of course, be construed as limiting the rights of employees under section 16(b) of the Fair Labor Standards Act to bring suit against their employers to recover unpaid minimum wages and overtime compensation.

On March 2, 1943, a suit for overtime compensation under the Fair Labor Standards Act was instituted by certain employees at the Modification Center (R. 395). Respondent, in accordance with the requirements of its contract with the Government, notified the Contracting Officer of the suit, enclosing a copy of the Wage-Hour Administrator's letter of February 26, 1943 (R. 396). Respondent stated that, in view of that letter and the National Labor Relations Board decision, the suit

was unlikely to succeed but pointed out that should any liabilities arise as a result of the suit respondent would expect to be reimbursed by the Government (R. 397). On April 6, 1943, respondent advised the Contracting Officer that the United States Attorney who had been conducting the defense of that suit had withdrawn from the case at the request of the Labor Department and requested instructions on whether it should proceed on the basis of a workweek of forty or forty-eight hours (R. 400-402). On April 19, 1943, the Army Air Forces advised respondent that, in view of prospective changes which would, it was believed, sufficiently segregate the bomber modification work from the airline's activities to take the St. Paul Modification Project out from under the Railway Labor Act, and in view of a belief that placing the project on a 40-hour workweek would improve labor relations and increase production, the change to such a workweek, with its attendant changes in rates of compensation, met with the approval of the contracting agency (R. 402-404).

On April 30, 1943, respondent notified its employees that subject to a contrary ruling by a government agency or a change in the statutes, the Modification Center would function under the Fair Labor Standards Act as soon as appropriate permission was obtained (R. 349). Respondent then asked the Regional Director of the National War Labor Board to approve its adoption of a forty-

hour workweek (R. 354). In its application respondent stated that changes in methods of production and operation had occurred, and that "We have been advised that these changes in methods of production have brought such activities within the ambit of the Wage and Hour Act" (R. 354). The Regional Director ruled that "on the basis of the facts above stated" the changeover to the Wage and Hour Act was permissible (R. 355).

The problem being "so tangled up with these various agencies", on May 4, 1943, one of respondent's officers conferred with William M. Leiserson, Chairman of the National Railway Labor Panel, who was thought to have jurisdiction over the subject in so far as respondent was concerned, concerning the changeover from the 48 to the 40 hour week (R. 356). As a result of that conference, letters were exchanged on that day by respondent and Chairman Leiserson (R. 357-362). Chairman Leiserson informed respondent that the modification center was "covered by the Railway Labor Act" and that "the proposed payment of time and one-half for overtime after forty hours per week cannot now be approved" (R. 361-362). Inasmuch as respondent thereafter continued the rates of pay previously approved by the Chairman on the basis of a 48-hour workweek, with the concurrence of the contracting agency (R. 406-409), the Chairman was not obligated to and did not convene an Emergency Board (see pp. 14-15, *infra*).

On May 17, 1943, respondent posted a notice at the St. Paul Modification Center, in which it advised its employees that the request to operate on the basis of a forty-hour workweek had been denied by the Chairman of the Panel (R. 363-364).[2] Thereafter, respondent continued to operate on the basis of a forty-eight hour workweek (R. 372-373).

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[2] This notice to employees read as follows:

On April 30, 1943, a notice was posted at the St. Paul Modification Center stating that, on and after April 1, 1943, with the permission of the War Department and subject to the approval of the proper Federal authorities, employees of the Modification Center, with the exception of supervisory employees, would receive time and one-half for all time in excess of forty hours per week or in excess of eight hours per day and that our existing contract with the Air Line Mechanics Association, International, was in the process of adjustment. Our present contract with the Air Line Mechanics Association, International, had been approved by the National Railway Labor Panel and accordingly authorization was requested of the Chairman of the National Railway Labor Panel, to pay our employees at the Modification Center, with the exception of supervisory employees, time and one-half for time in excess of forty hours per week or in excess of eight hours per day. The Chairman of the National Railway Labor Panel claimed and exercised jurisdiction of all of our employees and, referring to Executive Orders of the President, denied our request. Thereafter, the War Department withdrew its authorization permitting Northwest Airlines, Inc. to operate on a forty-hour week and pay time and one-half for overtime in excess of forty hours per week and in excess of eight hours per day and notified Northwest Airlines, Inc. for the time being to continue to pay its employees as in the past and as of prior to April 1, 1943, on the basis of a forty-eight hour week, straight time. Accordingly, our employees at the Modification Center will continue for the time being to receive pay as in the past and as of prior to April 1, 1943, on the basis of a forty-eight hour week, straight time.

On May 31, 1943, Local 134 UAW-CIO petitioned the National Labor Relations Board for reconsideration of its former decision (R. 105, 372) and on August 3, 1943, the Board reaffirmed its previous decision holding that the "Company's bomber modification project is so integrated with its carrier activities as to preclude a finding that the project is a separate and distinct enterprise" (R. 366-372).

On March 5, 1945, respondent requested a ruling from the Labor Department on the application to respondent's activities of Executive Order 9240, which provided for the payment of a premium wage for work "relating to the prosecution of the war" performed on the seventh day of a regularly scheduled workweek (R. 412-415). On March 9, 1945, the Labor Department replied that the St. Paul Modification Center was subject to the Executive Order (R. 636). The communication also stated that the matter had been discussed with the Wage-Hour Administrator and with the Secretary of the National Mediation Board (R. 637). This ruling was based upon the assumption that "the employees at this project did not perform any function in connection with the normal transportation activities" of the company (R. 416). Thereupon, respondent again requested the advice of the contracting agency, and was instructed on March 31, 1945, that it should continue to operate under the Railway Labor Act (R. 410-411). On

June 1, 1945, the Labor Department withdrew its determination of March 9, 1945, and advised respondent that, after careful study of all the facts developed, it had concluded that Executive Order 9240 was not intended to apply to the St. Paul Modification Project (R. 413, 415-417, 635-653).

3. *History of these cases.* These suits were brought in 1945 on behalf of 2,547 employees of the Modification Center (R. 4-21). Pursuant to stipulation between the parties the district court first heard and decided the issue of whether or not the work performed by petitioners was outside the coverage of the Fair Labor Standards Act by reason of the air-carrier exemption set forth in Section 13(a) (4) of that Act (R. 32). The district court, on January 18, 1947, held that the modification work was not within the Section 13(a) (4) exemption (R. 431). Similarly, the court heard and decided the question of whether or not petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act (R. 472). Again, on October 9, 1947, the district court decided that question in favor of petitioners (R. 609). After passage of the Portal-to-Portal Act, respondents moved for leave to file an amended answer to allege defenses under Sections 9 and 11[3] of the Portal-to-Portal

[3] Section 11 of the Portal-to-Portal Act (29 U.S.C., Supp. III, § 260) provides:

> In any action commenced prior to or on or after the date of the enactment of this Act [May 14, 1947] to recover unpaid minimum wages, unpaid overtime

Act (R. 604). The motion was granted (R. 607), the issues argued, and on February 9, 1948, the district court rendered its decision (R. 663). With respect to the Section 11 defense the court found that the failure to comply with the requirements of the Fair Labor Standards Act was in good faith and that respondent had reasonable grounds for believing it was not in violation of that Act (R. 691). The court held, therefore, that petitioners were not liable for liquidated damages under Section 16(b) of the Fair Labor Standards Act (R. 692). With respect to the Section 9 defense the district court found specifically that respondents had relied in good faith on the ruling of Mr. Leiserson, the Chairman of the National Railway Labor Panel (R. 690) (see p. 18, *infra*), but held that that ruling was not agency action within the meaning of Section 9 (R. 692) and, accordingly, that respondent was liable for the amount of unpaid overtime (R. 693).

Respondent appealed and the court of appeals agreed with the district court that the Section 13(a) (4) exemption was inapplicable (R. 739) and that respondent was engaged in the produc-

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compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.

tion of goods for commerce (R. 740). On the Portal-to-Portal issue, however, the court of appeals, while adopting the district court's finding on the good faith issue (R. 745), held that the ruling of the Chairman of the National Railway Labor Panel was agency action within the meaning of Section 9 (R. 749). The court of appeals, therefore, reversed and remanded for entry of judgment against petitioners (R. 749).

ARGUMENT

Of the two issues presented by petitioners, one is largely, and the other wholly, factual: the first is whether in these circumstances the ruling of the Chairman of the National Railway Labor Panel was agency action within the meaning of Section 9 of the Portal-to-Portal Act; the second is whether respondent relied in good faith on the ruling. The case does not involve any novel question of law requiring authoritative determination by this Court, and a decision by this Court would be significant only to the parties involved. Indeed, since Section 9 of the Portal-to-Portal Act applies only to acts or omissions occurring "prior to the date of the enactment of this Act" (May 14, 1947), the present problem cannot arise again. After that date, the Act recognizes reliance only upon rulings of the Wage and Hour Administrator. (Section 10(b)(1).) Moreover, only one similar case is pending. In any event, the conclusion of the court of appeals that

the ruling of the Chairman was agency action upon which respondent relied in good faith is correct and should not be reviewed by this Court.

1. a. The district court held that the emergency boards provided for in Executive Order 9299, and not the Chairman of the Railway Labor Panel, constituted the agency authorized to act, and that therefore the latter's ruling was not agency action within the meaning of the Portal-to-Portal Act. In so holding, the district court misread the Executive Order.

The National Railway Labor Panel was created by Executive Order No. 9172, May 22, 1942 (7 F.R. 3913, 3 C.F.R. Cum. Supp. 1164), "for the duration of the war and six months thereafter" to adjust disputes not referable to the National Railroad Adjustment Board. By Executive Order No. 9299, February 4, 1943 (8 F.R. 1669, 45 U.S.C. § 156, Note) (*infra,* Appendix p. 25), it is provided that with certain exceptions not relevant here, no carrier can make any changes in wage rates "unless notice of such proposed change shall have been filed with the Chairman of the National Railway Labor Panel * * * and shall have been permitted to become effective as hereinafter provided." Paragraph 3 of that Executive Order provides:

> 3. If the Chairman of the National Railway Labor Panel has reason to believe that the proposed change, in wage rates or salary, may not

> conform to the standards prescribed in Executive Order No. 9250, or to the general stabilization program made effective thereunder, or to the directives on policy issued by the Economic Stabilization Director thereunder *and the proposed change is not modified to conform to such standards, program, and directives,* he shall designate three members of the Panel as an Emergency Board to investigate the proposed change and to report to the President. *Otherwise, the Chairman of the Panel may permit the proposed change to become effective.* [Italics added].

Paragraph 5 provides that a copy of the Emergency Board's report must be filed with the Economic Stabilization Director, among others and that, unless the latter shall otherwise direct, the Board's recommendation with respect to the proposed change in wage rates shall become operative thirty days after the report is filed with the President.

The language of Executive Order No. 9299 permits of no other interpretation than that given it by the court of appeals. The wages of employees subject to the Railway Labor Act cannot be changed without the approval of the Chairman of the Panel. The proposed wage change must, in the first instance, be acted on by him. If he approves, no further action by the Panel is called for. If he disapproves and the applicant acquiesces in his ruling, there is, similarly, no occasion for other action by the Panel. In either case the action of the

Chairman is the only "agency" action provided by law. Only where the Chairman disapproves the proposed change *and his ruling is not complied with* is there any occasion for the designation of an Emergency Board. True, in such a case, the Chairman's ruling is not final. But in every case the Chairman must rule first and where, as here, the applicant complies with his ruling it is the final action of the Panel. The opinion of the court of appeals supplies a complete answer to the contention that the Chairman's ruling was not the formal action of the Panel (R. 748-749):

> [T]he fact that if [The Chairman's ruling] is complied with there is no necessity for the Emergency Board compels the conclusion in our judgment that the Chairman's action is formal and is, unless disregarded, the final ruling of the Agency. To hold otherwise would require that anyone submitting a proposed schedule of wages for approval, under these Executive Orders would be required, before it could rely upon a ruling as the ruling of the Panel, that it not only submit the schedule to the Chairman but that it must obtain the disapproval of the Chairman, that it must then see that an Emergency Board is created, that the Emergency Board rule upon it, that the Board then file its recommendations and findings with the Director of Economic Stabilization and the President, and that it must then wait 30 days to see if the Stabilization Director reversed the Board or if the President reversed the Director of Economic Stabilization.

b. Petitioners do not seem to argue very strenuously [4] against the conclusion of the court of appeals "that the ruling of the Chairman of the National Railway Labor Panel was, under the facts of this case, the administrative ruling of the Panel" (R. 749). Instead they place their main emphasis on the argument that because the courts below have now held erroneous the Chairman's ruling that the Panel had jurisdiction under the Railway Labor Act over the employees at the Modification Center, the ruling—whether by the Panel as a whole, the Chairman, or the Emergency Board—is not within the purview of Section 9 of the Portal-to-Portal Act. This argument flies squarely in the face of the language of Section 9 which provides unequivocally that reliance may have been on the action of "any agency of the United States"; and that a defense based on such action shall be good even if that action is subsequently "determined by judicial authority to be invalid or of no legal effect."

Without mentioning this clause of Section 9, petitioners argue that because the error of the Chairman may be characterized as jurisdictional, Section

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[4] Petitioners' entire argument on this point consists of a statement of a conclusion (Pet. 23):

> Although it was clear from the executive orders defining the powers of the Railway Labor Panel that, as the trial court held, only an emergency board could rule upon proposed wage changes, the Court of Appeals held that the Chairman of the Railway Labor Panel acting erroneously and, individually constituted "an agency of the United States," under the Portal Act.

9 is inapplicable. But the language of the clause just quoted does not suggest that Congress was seeking to draw the elusive line between jurisdictional and other error. Here the area of the agency's authority was not so remote from the subject matter of the ruling as to make suspect the good faith of an employer relying on it. The authority granted the Chairman of the Railway Labor Panel by Executive Order 9299 undoubtedly included the power to determine—at least in the first instance—whether the case fell within his jurisdiction. This Court has consistently held, in the analogous situation involving judicial decisions, that an unreversed determination of a jurisdictional question, whether or not erroneous, is *res judicata*. *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 77; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 403; *Stoll* v. *Gottlieb*, 305 U.S. 165, 171; cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 292. Congress clearly would have intended that principle to be applicable here.

2. Petitioners' arguments in support of the proposition that this was not agency action are largely directed to the issue of good faith reliance. Even assuming that their arguments were persuasive, this Court has often said that it will not review a fact-finding of the district court which has been adopted by the court of appeals. *Comstock* v. *Group of Investors*, 335 U.S. 211; *United States* v. *Dickinson*, 331 U.S. 745.

The district court in its finding XI specifically found (R. 690):

> On or about May 4, 1943, the Chairman of the National Labor Railway Panel advised defendant, after defendant made inquiry of him, that the modification project must be operated pursuant to the Railway Labor Act, not the Fair Labor Standards Act, as defendant had requested. *Defendant acted in conformity with, and in reliance on, that opinion in good faith.* The denial to defendant of the right to pay its modification employees according to the Fair Labor Standards Act was not submitted by the Chairman of the Panel to an Emergency Board or any other board or persons. The powers of the Chairman were granted by Executive Orders. (Italics added).

It concluded, however, that the action of the Chairman was not agency action under Section 9 (R. 692). Petitioners could not, of course, appeal from that finding, but they did challenge it in an effort to sustain the judgment. (Brief for Appellees, p. 34). Despite their challenge, it was adopted by the court of appeals (R. 745). There is no sound reason why this Court should reexamine that finding.

Petitioners' argument (Pet. pp. 27-32) that the finding related to good faith under Section 11 and not under Section 9, and that therefore the court of appeals erred in adopting it to support its judgment, is insupportable. In the first place, they

completely fail to document their statement that "good faith" as it is used in Section 9 has a different meaning than "good faith" as used in Section 11. The natural presumption would seem to be that the phrase was used in its ordinary sense in both Sections and that it was intended to have the same meaning in both. But whatever the intention of Congress in that respect, the district court in this case made *two* findings of good faith. The first, Finding XI, was made almost precisely in the language of Section 9 of the Portal-to-Portal Act: "Defendant acted in conformity with, and in reliance on, that opinion in good faith" (R. 690). The second, Finding XIII, was in the language of Section 11 of the Act: "Defendant's failure to pay its employees according to the Fair Labor Standards Act * * * was in good faith, and defendant had reasonable grounds for believing in good faith that such failure was not a violation of the Fair Labor Standards Act of 1938, as amended" (R. 691). The requirements of Section 9 and Section 11 are different. To escape liability completely under Section 9 there must be good faith conformance with and reliance on some administrative action. To escape liability for liquidated damages, under Section 11, there need only be good faith and reasonable grounds for believing in good faith that the act or omission complained of was not a violation of the Fair Labor Standards Act. The purpose of the district court in making sepa-

rate findings, one in the words of Section 9, and the other in the words of Section 11 is obvious. Finding XI could only have been intended as a finding of good faith under Section 9 and Finding XIII as a finding of good faith under Section 11.

Petitioners' arguments that there could not have been good faith in this case, as a matter of law, are unpersuasive. They rely heavily on discussions of this particular case on the floor of the House, during the debate on the Portal-to-Portal Act, to show that in the opinion of certain Congressmen the defense of good faith would not be available to respondent.[5] But the question of good faith in a particular case was left for the courts to decide (see *Lassiter* v. *Guy F. Atkinson Co.*, 176 F. 2d 984 (C.A. 9)), and they cannot decide it by weighing the opinions of legislators reached on the basis of an incomplete presentation of the facts of the dispute. The remarks of the Congressmen during the course of the debate are not controlling. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, decided May 21, 1951, Nos. 442-443, 1950 Term.

3. Petitioners also contend that even if the Chairman's ruling was agency action on which respondent relied in good faith it cannot excuse

[5] On the floor of the Senate, a contrary opinion was expressed with respect to the question whether respondent could, under the Senate version of the bill, in which the good faith defense pertained only to liquidated damages, escape liability for liquidated damages. 93 Cong. Rec. 2240, 80th Cong. 1st Sess. Senator Wherry, author of the Senate provision, was of the opinion that respondent would not be liable for liquidated damages.

violations of the Fair Labor Standards Act prior to May 4, 1943, the date on which it was issued. We submit that this contention is insubstantial and is based on a strained reading of Section 9. It seems most unlikely that Congress intended that an employer should be forgiven violations of the Fair Labor Standards Act occurring subsequent to an administrative ruling and not be forgiven the violations toward which that ruling was directed. In any event that question is certainly no longer of importance to anyone except the parties to this case.

The case of *Asselta* v. *Madison Ave. Corp.*, 90 F. Supp. 442, 18 Labor Cases 65,772, 65,792 (S. D. N. Y.), on which respondents rely, presented a totally different fact situation. There, the employer was, after the decision of the Court of Appeals for the Second Circuit in *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. 2d 278, on notice that he was in violation of the Fair Labor Standards Act. The district court simply held that he could not be forgiven for any violation between the time he was put on notice and the time of his reliance on a subsequent administrative ruling. That situation sharply contrasts with this case where it had never definitely been determined that respondent was violating the Fair Labor Standards Act. On the contrary, when respondent attempted to change the wage-rates to comply with the Act it was forbidden to do so.

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE, 1951

APPENDIX

Sections 9 and 10 of the Portal-to-Portal Act, Act of May 14, 1947, (61 Stat. 84, 88-89, 29 U.S.C. §§ 258, 259) provide as follows:

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the

enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act —the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act— the Secretary of Labor.

Executive Order No. 9172, May 22, 1942, (7 F.R. 3913, 3 C.F.R. Cum. Supp. 1164), provides, in pertinent part, as follows:

> 1. There is hereby created, for the duration of the war and six months thereafter, a National Railway Labor Panel of nine members, hereinafter referred to as the Panel, to be appointed by the President, and to be qualified as to membership thereon in the same manner as provided in Section 10 of the Railway Labor Act for membership on emergency boards. The President shall designate a chairman from the members of the Panel and shall fill vacancies thereon as they may occur. The Chairman of the Panel shall receive such compensation, together with necessary travelling expenses, as the President may prescribe. The members of the Panel shall receive necessary travel expenses and subsistence expenses or per diem allowances in lieu thereof on such days as they are actually engaged in performance of duties pursuant to this Order.

Executive Order No. 9299, February 4, 1943 (8 F.R. 1669, 45 U.S.C. § 156, Note), provides as follows:

> By virtue of the authority vested in me by the Constitution and statutes of the United States, and more particularly by the act of October 2, 1942 (Public Law 729, 77th Congress), it is hereby ordered:
>
> 1. No increases in the wage rates or salary of any employee subject to the provisions of the Railway Labor Act, whether granted as a

result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in such wage rates or salary, shall be made except in accordance with the provisions of this order; *Provided, however,* That nothing contained in this order or Executive Order No. 9250 shall be construed as affecting the procedure or limiting the jurisdiction of either the National Mediation Board, as defined in the Railway Labor Act, or the National Railway Labor Panel, as defined in Executive Order No. 9172, except as herein specifically set forth.

2. No carrier shall make any change in wage rates, except such changes as by general order of the National War Labor Board, or by regulations of the Commissioner of Internal Revenue, are permitted to be made without the specific approval of the Board or the Commissioner, as the case may be, unless notice of such proposed change shall have been filed with the Chairman of the National Railway Labor Panel, created by Executive Order No. 9172, and shall have been permitted to become effective as hereinafter provided.

Notwithstanding § 4001.2 of the Regulations of the Economic Stabilization Director, for the purpose of determining what wage and salary adjustments may be made without any specific approval, the general orders of the National War Labor Board shall be applicable to all employees subject to the Railway Labor Act, except those receiving salaries at the rate of $5,000 or more per annum in regard to whom the regulations of the Commissioner of In-

ternal Revenue shall apply. But any adjustment of salary under $5,000 heretofore approved by the Commissioner shall not be affected by this order.

3. If the Chairman of the National Railway Labor Panel has reason to believe that the proposed change, in wage rates or salary, may not conform to the standards prescribed in Executive Order No. 9250, or to the general stabilization program made effective thereunder, or to the directives on policy issued by the Economic Stabilization Director thereunder and the proposed change is not modified to conform to such standards, program, and directives, he shall designate three members of the Panel as an Emergency Board to investigate the proposed change and to report to the President. Otherwise, the Chairman of the Panel may permit the proposed change to become effective.

4. Emergency Boards, whether designated pursuant to the Railway Labor Act, Executive Order No. 9172, or section 3 of this order, in reporting to the President shall certify that their recommendations in regard to any proposed change affecting wage and salary payments conform with the standards prescribed in Executive Order No. 9250, the general stabilization program made effective thereunder, and with the directives on policy issued by the Economic Stabilization Director thereunder.

5. Copies of the report with recommendations made to the President by any Emergency

Board under section 4 of this order shall be filed by the Board forthwith with the Economic Stabilization Director, the National War Labor Board and the Commissioner of Internal Revenue. The Economic Stabilization Director may on behalf of himself or other departments and agencies concerned, report to the President the effect of the recommendations on the general stabilization program. Unless and except to the extent that the Economic Stabilization Director shall otherwise direct, the recommendations of the Emergency Board in regard to proposed changes affecting wages and salary payments shall, upon the expiration of thirty days after the report is filed with the President, become effective.

6. The National War Labor Board and the Commissioner of Internal Revenue shall either rule on any application for approval of wage and salary adjustments now before the Board and the Commissioner or transfer it to the Chairman of the National Railway Labor Panel. The Board and the Commissioner shall not rule on any application hereafter made.

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